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## CHON AH JEE & ORS

**v.**

## LIM TIAN HUAT & ANOR

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
CLEMENT SKINNER J
[ORIGINATING SUMMONS NO: K24-192-2007-II]
9 DECEMBER 2009

C ***COMPANY LAW:*** *Winding up - Power of attorney - Validity of irrevocable power of attorney given by wound up company - Whether validity of power of attorney affected by winding up - Whether assets of wound up company may be sold pursuant to the power of attorney*

D ***COMPANY LAW:*** *Winding up - Receivers - Rights and duties, of - Sale of assets - Whether receiver could sell charged land by way of private treaty - Whether sale was pursuant to debenture - Whether power of receiver to sell land derived under joint venture agreement and irrevocable power of attorney*

E The plaintiffs were common directors and shareholders in Bigraise Telipok Sdn Bhd ('Bigraise Telipok') and Bigraise Sdn Bhd ('Bigraise'). Bigraise was the owner of two parcels of land ('the first two lands'). Bigraise Telipok was the owner of another piece of land ('the third land') whereas Bigraise Telipok and Bigraise entered into a Joint-Venture Agreement ('the JV Agreement') whereby Bigraise Telipok would develop Bigraise's first two lands into a residential, industrial and
F commercial complex ('the Project'). Under the terms of the JV Agreement, Bigraise would appoint Bigraise Telipok as its lawful attorney to implement the joint-venture. Bigraise formally executed a Power of Attorney in favour of Bigraise Telipok. Bigraise Telipok executed two debentures as security for certain loans given by the 2nd defendant
G ('AmBank') to Bigraise Telipok. It also executed a charge over the third land to AmBank. Bigraise also executed two debentures as security for the loans granted by AmBank to Bigraise Telipok. By way of additional security, Bigraise also executed a third party charge over the first two lands in favour of AmBank. Bigraise Telipok subsequently encountered
H financial difficulty and failed to complete the Project. It defaulted in its payment obligations to AmBank. One Mr Lim was appointed as Receiver and Manager ('the receiver') for Bigraise Telipok under the debentures. Subsequently, Bigraise Telipok was wound-up. The receiver took steps to sell off the remaining completed units in Phase I of the Project and
I part of the first two lands by way of private treaty. The plaintiffs commenced this action seeking declarations, *inter alia*, that: (i) the 1st defendant being the receiver appointed for Bigraise Telipok had no

authority to sell the apartments built on the first two lands pursuant to the debentures executed between Bigraise Telipok Sdn Bhd and AmBank as the first two lands were the properties of Bigraise and not the properties of Bigraise Telipok; and (ii) by relying on the provisions of the debentures, the 1st and 2nd defendants did not have the power to sell the first two lands without resorting to the procedures for sale of charged lands prescribed under the Sabah Land Ordinance.

**Held (dismissing plaintiffs' application with costs):**

**(1)** In relation to the JV Agreement entered into with Bigraise, the receiver as an officer of Bigraise Telipok had a responsibility to ensure that the obligations of Bigraise Telipok were honoured and the receiver as such officer, would possess the same powers, rights and privileges that Bigraise Telipok possessed. The receiver relied on Bigraise Telipok's rights and powers under the JV Agreement entered into with Bigraise as well as the powers contained in the Power of Attorney which was given to Bigraise Telipok for better giving effect to the terms of the JV Agreement. The receiver was not exercising any powers under the two debentures. (paras 19 & 20)

**(2)** When the receiver sought to sell the completed units on the first two lands as well as the whole or part of the first two lands, he continued to exercise the rights and powers under the JV Agreement and the Power of Attorney. The rights conferred by the Power of Attorney on Bigraise Telipok and therefore the receiver as well, showed that wide powers were conferred to sell, dispose and transfer the first two lands including the completed units. (para 21)

**(3)** The Power of Attorney was expressly declared by Bigraise to be irrevocable and was given pursuant to the performance of contractual obligations owed to Bigraise Telipok under the JV Agreement which obligations had not been fully discharged. (para 27)

**(4)** Since the receiver was not attempting to foreclosure or sell off the first two lands or the units built thereon under the charge or even the debentures, there was absolutely no reason why he needed to proceed in accordance with the provisions of the Sabah Land Ordinance. (para 31)

**(5)** This was not a sale at the instance of a chargee. Here, the land was being sold by the receiver as agent of the chargor landowner *ie*, Bigraise Telipok. The receiver may lawfully sell by private treaty in such a situation; *Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* (refd). (para 33)

**Case(s) referred to:**

*K Balasubramaniam (Likuidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors [2005] 1 CLJ 793 FC* ***(refd)***

*Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC* ***(refd)***

*Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor [2003] 2 CLJ 86 FC* ***(foll)***

*Wellington Steam Ferry Company (Limited) (In Liquidation) and Anor v. The Wellington Deposit Mortgage and Buidling Association (Limited) [1915] 34 NZLR 913* ***(refd)***

**Legislation referred to:**

Civil Law Act 1956, s. 5(1)
Companies Act 1965, s. 4(1)(a), (b)
Powers of Attorney Act 1949, s. 6

Powers of Attorney Act 1971 [UK], s. 4(1)

*For the plaintiffs - Marzuki Spawi; M/s Marzuki Spawi & Co*
*For the 1st defendant - Sonny Durai; M/s Allion Kitingan & Partners*
*For the 2nd defendant - Dr David Fung; M/s Alex Pang & Co*

*Reported by Amutha Suppayah*

## JUDGMENT

**Clement Skinner J:**

**[1]** I had earlier dismissed the 1st, 2nd and 3rd plaintiff's amended originating summons (encl. 37) with costs. I now give my reasons for doing so.

**[2]** The plaintiffs' originating summons was directed against the 1st defendant Mr Lim Tian Huat who in his capacity as Receiver and Manager of Bigraise Telipok Sdn Bhd was trying to sell off certain properties belonging to the companies hereafter mentioned by way of private treaty in the circumstances hereafter described.

**[3]** The plaintiffs are common directors and shareholders in two companies, namely, Bigraise Telipok Sdn Bhd (hereafter 'Bigraise Telipok') and Bigraise Sdn Bhd (hereafter 'Bigraise').

**[4]** Bigraise is the owner of two parcels of land held under CL No. 015329423 and CL No. 015328711 (the 'first two lands'). Bigraise Telipok is the owner of a piece of land held under CL No. 015108282 ('the third land'). A

**[5]** On 28 February 1997, Bigraise Telipok and Bigraise entered into a Joint-Venture Agreement ('the JV Agreement') whereby Bigraise Telipok would develop Bigraise's first two lands into a residential, industrial and commercial complex ('the project'). B

**[6]** Under the terms of the JV Agreement Bigraise would also appoint Bigraise Telipok as its lawful attorney to implement the joint-venture. On 28 February 1997, Bigraise formally executed a power of attorney in favour of Bigraise Telipok. C

**[7]** On 16 April 1997 and 23 July 1997, Bigraise Telipok executed two debentures respectively. The debentures were security for a loan of RM13,000,000 and RM2,800,000 respectively given by AmBank (M) Berhad ('the 2nd defendant') to Bigraise Telipok; who also executed a charge over the third land to AmBank. D

**[8]** Bigraise also executed two debentures on 14 April 1997 and 23 July 1997 respectively as security for the loan of RM13 million and RM2.8 million granted by AmBank to Bigraise Telipok. By way of additional security Bigraise also executed a third party charge over the first two lands in favour of AmBank. E

**[9]** Bigraise Telipok drewdown on the loans but it subsequently encountered financial difficulties. Bigraise Telipok failed to complete the first phase of the project known as Taman Wangsa Phase I and defaulted in its payment obligations to AmBank. Taman Wangsa Phase I became an abandoned project. F

**[10]** On 14 May 2002, Mr Lim Tian Huat was appointed as Receiver and Manager (hereafter 'the receiver') for Bigraise Telipok under the debentures dated 16 April 1997 and 23 July 1997. G

**[11]** The Ministry of Local Government and Housing ('the ministry') then directed the revival of the project under the receiver. The receiver had to, amongst others, negotiate with purchasers who had already bought units in the project to agree to the rehabilitation, secure a facility of RM9 million from the 2nd defendant to finance the revival and completion of the project, appoint contractors and consultants, fulfill the requirements of the ministry for a bank guarantee of RM950,000, fulfill the requirements of the Jabatan Kerja Raya (JKR) and Dewan Bandaran Kota Kinabalu (DBKK) for access road that could accommodate heavy vehicles to the project so as to enable the issuance of the certificate of fitness for occupation for Phase I of the project which was issued on 11 September 2007. H I

**[12]** On 28 February 2006, Bigraise was wound-up.

**[13]** In about November 2007, the receiver took steps to sell-off the remaining completed units in Phase I of the project and part of the first two lands by way of private treaty.

**[14]** On 12 December 2007, the plaintiffs commenced this action seeking several declarations which were subsequently amended to three remaining declarations only. Subsequently, the plaintiffs abandoned one declaration regarding to information relating to the project leaving the following two declarations for decision of the court, which I will now address in turn.

> 1. A Declaration that the 1st defendant being the Receiver and Manager appointed for Bigraise Telipok Sdn. Bhd. has no authority to sell the apartments built on C.L. 015329423 and C.L. 015328711 (the first two lands) and / or the whole or part of the first two lands pursuant to the Debentures dated 16.04.1997 and 23.07.1997 executed between Bigraise Telipok Sdn. Bhd. and AmBank as the first two lands are the properties of Bigraise Sdn. Bhd. and not the properties of Bigraise Telipok Sdn. Bhd.

**[15]** For the purpose of this declaration, it is not in dispute between the parties that Bigraise is the owner of the first two lands and that Bigraise did execute two debentures as well as a third party charge over the first two lands to AmBank as security for the loans given to Bigraise Telipok.

**[16]** It is the plaintiffs' case that since the receiver was never appointed as the Receiver and Manager of Bigraise pursuant to the debentures (dated 14 April 1997 and 23 July 1997) executed in favour of AmBank, he had no authority to sell the first two lands since they belong to Bigraise and not Bigraise Telipok. According to the plaintiffs, this is so because under cl. 4.03 of the debentures which Bigraise executed, a receiver and manager who is appointed only has the right to take charge of the property and assets owned by Bigraise, but since the receiver and manager here was never appointed as a Receiver and Manager of Bigraise, he cannot sell the first two lands.

**[17]** It is evident to me from the contentions and submissions of the plaintiffs that they are laboring under a fundamental assumption that the receiver is selling the first two lands pursuant to the two debentures signed by Bigraise in favour of AmBank. With all respect, this is a false assumption.

**[18]** From Mr Lim Tian Huat's (receiver's) affidavit affirmed on 3 June 2008 (encl. 39) it is evident to me that he is selling the apartments and the remainder of the first two lands pursuant to such right and power as contained in the JV Agreement between Bigraise Telipok and Bigraise and the ensuing power of attorney dated 28 February 1997 given by Bigraise (as donor) to Bigraise Telipok to implement the joint venture. In doing so, the receiver is not seeking to exercise any powers under the two debentures executed by Bigraise.

**[19]** In my judgment, when the receiver was appointed in respect of Bigraise Telipok on 14 May 2002, the receiver became and acted as an "officer" of Bigraise Telipok much like the directors of the company. Section 4(1)(a) and (b) of the Companies Act 1965 defines "officer" in relation to a corporation to include "a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument". Accordingly, in relation to the JV Agreement entered into with Bigraise, the receiver as an officer of Bigraise Telipok has a responsibility to ensure that the obligations of Bigraise Telipok are honoured and the receiver as such officer, would possess the same powers, rights and privileges that Bigraise Telipok possesses.

**[20]** It is clear to me from what the receiver said in his affidavit of 3 June 2008 (encl. 39) that when he went about reviving the project, raised the loans, fulfilled the conditions imposed by the ministry, JKR and DBKK and developed the project until completion, he relied on Bigraise Telipok's rights and powers under the JV Agreement entered into with Bigraise as well as the powers contained in the power of attorney which was given to Bigraise Telipok for better giving effect to the terms of the JV Agreement. It is clear to me that the receiver was not exercising any powers under the two debentures which the plaintiffs refer to.

**[21]** Likewise when the receiver sought to sell the completed units on the first two lands as well as the whole or part of the first two lands, he continued to exercise the rights and powers under the JV Agreement and the power of attorney. In my view, a reading of the rights conferred by the power of attorney on Bigraise Telipok and therefore the receiver as well, show that wide powers were conferred to sell dispose and transfer the first two lands including the completed units. In particular, para II of the power of attorney reads:

> To decide on the rental or sale prices of the units of buildings constructed or to be constructed on the said lands or part thereof and individual lots of vacant land comprised in the Project and to sell, lease, rent or otherwise howsoever deal with or dispose of the units at such time and in such manner as the Donee may at its sole discretion deem fit and for such purposes to sign, execute any documents or instruments to put such decisions into effect.

Para 16 of the power of attorney reads:

> To sign or otherwise execute all memorandum of transfers, sale and purchase agreements, assurances, conveyances, instruments and documents whatsoever for the purpose of transferring and vesting the legal title and beneficial ownership of the units of buildings in the Project in the various purchasers and / or the Donees themselves or their nominee or nominees and to collect and receive from all such purchasers the purchase money payable in respect thereof.

Para 17 of the power of attorney reads:

> To sign or otherwise execute all memorandum of transfers, sale and purchase agreements, assurances, conveyances, instruments and documents whatsoever for the purpose of transferring and vesting the legal title and beneficial ownership of the said lands or any part or parts thereof in whomsoever including but not limited to the Donee themselves as the Donee deem fit or to deal with the said lands howsoever as if the Donee were the registered owner.

I accordingly agree with counsel for the 1st and 2nd defendant that the submissions and contentions of the plaintiffs have shown a failure to appreciate that the receiver's intended sale of the completed units and part of the first two lands was:

(i) not pursuant to the debentures given by Bigraise Telipok to the 2nd defendant;

(ii) not as an agent of Bigraise under the two separate debentures it gave to the 2nd defendant; and

(iii) not purporting to be by way of foreclosure proceedings or to enforce the charges over the first two lands under the Sabah Land Ordinance,

but are the exercise of powers of sale by Bigraise Telipok itself as developer of the first two lands under Bigraise Telipok's rights and powers contained in the JV Agreement and Power of Attorney.

**[22]** The power of attorney executed by Bigraise in favour of Bigraise Telipok is one given for valuable consideration and expressed to be irrevocable under any circumstances. However, it is known that Bigraise was wound-up on 28 February 2006. Generally speaking a power of attorney ends with the demise of the donor and in the case of a company, with the winding-up of the company. The question therefore arises: Did the winding-up of Bigraise render the power of attorney discharged, terminated or otherwise ineffective?

**[23]** The plaintiffs did not present any arguments on this point. If this case was being heard in West Malaysia, the winding-up would not affect the power of attorney as it would be saved by the exceptions provided in s. 6 of the Powers of Attorney Act 1949 as decided by the Federal Court in *K Balasubramaniam (Likuidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors* [2005] 1 CLJ 793), which applied the decision in the New Zealand case of *Wellington Steam Ferry Company (Limited) (In Liquidation) and Anor v. The Wellington Deposit Mortgage and Buidling Association (Limited)* [1915] 34 NZLR 913.

**[24]** The Powers of Attorney Act 1949 does not apply in Sabah, and Sabah does not have such an Enactment. Does it mean then that the power of attorney given by Bigraise to Bigraise Telipok cease to be effective on it being wound-up? I find not.

**[25]** The power of attorney is irrevocable and given pursuant to contractual obligations which have not been fully discharged. The direct authority for this proposition is the English Powers of Attorney Act 1971 at s. 4(1). In my judgment, the English Powers of Attorney Act 1971 will apply in this case in the State of Sabah by virtue of the provisions of s. 5(1) and (2) of the Civil Law Act 1956, in that, the issue or question of law now before the court is one relating to "principals and agents" as specified in s. 5(1) of the Civil Law Act 1956 and, the power of attorney here was given in 1997 and relied on by Bigraise Telipok right through to the present time at which corresponding period the like case in England would be governed by the English Powers of Attorney Act 1971.

**[26]** Now, s. 4(1) of the English Powers of Attorney Act 1971 reads:

**4. Powers of Attorney given as security**

(1) Where a Power of Attorney is expressed to be irrevocable and is given to secure:

(a) a proprietary interest of the donee of the power; or

(b) the performance of an obligation owed to the donee,

then so long as the donee has that interest or the obligation remains undischarged, the power shall not be revoked:

(i) by the donor without the consent of the donee; or

(ii) by the death, incapacity or bankruptcy of the donor or, if the donor is a body corporate by its winding-up or dissolution.

**[27]** Reverting to the facts here, the two conditions are satisfied. First, the power of attorney is expressly declared by Bigraise to be irrevocable. Second, the power of attorney was given pursuant to the performance of contractual obligations owed to Bigraise Telipok under the JV Agreement which obligations have not been fully discharged as the receiver's performance of obligations under the JV Agreement here and now shows.

**[28]** Accordingly, the plaintiffs' application for the first declaration must be refused.

> 2. A Declaration that the 1st and 2nd defendant by relying on the provisions of the Debentures dated 16.04.1997 and 23.07.1997 did not have the power to sell C.L. 105329423 and C.L. 015108282 without resorting to the procedures for sale of charged lands prescribed under the Sabah Land Ordinance.

**[29]** What the plaintiffs are really complaining about here is that the receiver and AmBank are relying on the two debentures executed by Bigraise to sell off the first two lands and the third land and therefore did not have the requisite power to sell the lands for the reasons they gave earlier ie, the receiver was never appointed as the Receiver and Manager of Bigraise. Instead the plaintiffs contend that the 1st and 2nd defendants cannot sell the first two lands by private treaty but must go through the prescribed foreclosure procedures provided in the Sabah Land Ordinance since the first two lands were charged by Bigraise to the 2nd defendant. In support, the plaintiffs rely on the case of *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274. I do not agree.

**[30]** With all respect, I find that from the submissions made by the plaintiffs, there is a fundamental failure on the plaintiffs' part to understand or appreciate in what capacity the receiver is acting in when he decided to sell the first two lands. From their submissions, it is obvious that the plaintiffs are labouring under the mistaken belief that the receiver is seeking to rely on the powers contained in the two debentures executed by Bigraise when the receiver was never appointed as a Receiver and Manager of Bigraise and so cannot rely on the powers of sale stated in cl. 4.03 and 4.04 of those debentures. This is a misconception on the plaintiffs' part.

**[31]** As far as the first two lands are concerned, the receiver has stated in his affidavit of 3 June 2008 (encl. 39) and I have already indicated that I find it to be so, that he was acting pursuant to Bigraise Telipok's rights and powers under the JV Agreement and the power of attorney in selling of the completed units and part of the first two lands and that

he was not acting pursuant to the debentures executed by Bigraise as the plaintiffs have wrongly assumed. In so acting, I find the receiver is exercising such rights and powers as an officer of Bigraise Telipok and therefore relying on all rights and powers Bigraise Telipok had as developer in relation to the first two lands. Since the receiver is not attempting to foreclosure or selling off the first two lands or the units built thereon under the charge or even the debentures, there is absolutely no reason why he needs to proceed in accordance with the provisions of the Sabah Land Ordinance.

**[32]** With regard to the third land, the receiver has stated that he is here relying on the powers given to him as receiver and manager under the debentures granted by Bigraise Telipok to the 2nd defendant to sell off this piece of land which is owned by Bigraise Telipok. In doing so, I find that the decision in *Kimlin Housing* has no application to the facts here for the following reasons. An essential feature in the *Kimlin Housing* case was that the debenture under which the receiver and manager there was appointed did not contain an express provision appointing the receiver and manager as the attorney of the company and hence to sell the charged land in that capacity, and, the company subsequently went into liquidation which meant that the receiver and manager ceased to be an agent of the chargor company after that event. It was in those circumstances that the court held in *Kimlin Housing* that if the receiver and manager wanted to sell the charged lands under the debenture there, since the receiver and manager was no longer acting as agent of the chargor company (which was already wound-up), but as an agent of the debenture holder ie, the chargee of land, a chargee of land wishing to sell charged land can only do so in accordance with the provisions of the National Land Code.

**[33]** The facts of this case are quite different. Here, the debenture empowers the receiver and manager to act as the lawful attorney of Bigraise Telipok. Further, cl. 4.03(d) of the debenture expressly states that on appointment, a receiver and manager shall be the agent of the chargor ie, of Bigraise Telipok as owner of the land. And the same clause also expressly includes a power of sale. Even further still, Bigraise Telipok has not been wound-up here. The significance of this is that, in this case, when he took steps to sell off the third land, the receiver and manager continues to act as the agent of and as if he is the chargor of the land ie, Bigraise Telipok. And it is clear that a landowner may sell off his own land (even though it is charged) by private treaty if he gets the consent of the chargee to do so. There is no need for the owner/chargor in such a case to go through the provisions of the Sabah Land Ordinance to sell off the land because nobody is foreclosing on the land. This is not a sale at the instance of a chargee. Here, the land is being sold by the receiver and manager as

agent of the chargor landowner ie, Bigraise Telipok. That the receiver and manager may lawfully sell by private treaty in such a situation is authoritatively stated by the Federal Court in *Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* [2003] 2 CLJ 86, in which case *Kimlin Housing* was considered. In *Melantrans*, the question of law posed to the court was framed as follows: "Notwithstanding a valid power of attorney contained in a debenture, can the receivers and managers appointed under the debenture proceed to sell the property charged under the NLC by private treaty?".

**[34]** The brief facts in the *Melantrans*' case is that the first respondent who was the registered owner of a parcel of land charged it and also executed a debenture to the second respondent there as security of banking facilities by the latter. The second respondent then exercised its rights under the debenture and appointed a receiver and manager of all the assets and undertaking of the first respondent. There was a clause in the debenture empowering the receiver and manager to act as agent of the first respondent, and another clause giving the power to effect sale of the asset secured by the debenture after taking possession of them. There was also a clause irrevocably appointing the receiver and manager as the lawful attorney of the first respondent. The receiver and manager entered into a private sale of the property with the appellant who subsequently did not want to proceed with the sale on the ground that he did not think the receiver and manager had power to sell the property in view of the Supreme Court's decision in *Kimlin Housing*. The first respondent applied for a declaration that the receiver and manager was duly empowered by the debenture to sell the property. The High Court granted the declaration. The Court of Appeal affirmed the High Court's decision. The Federal Court answered the question of law posed to it in the affirmative. In doing so, the judgment of the Federal Court makes it very clear that:

(a) the Federal Court confined the application of *Kimlin* to its facts, ie, one where the debenture did not contain an express provision appointing the receiver and manager as attorney of the company;

(b) that the statutory remedy of sale of charged land under the provisions of the National Land Code apply to all cases where the sale is undertaken by or at the instance of a chargee, and not of a chargor;

(c) that the sale was being undertaken by the receiver and manager on behalf of the first respondent, who was the chargor of the land; therefore the receiver and manager could act and exercise the power of sale (by private treaty) under the debenture.

**[35]** It can be seen that the facts in this case are similar to that in the *Melantran*'s case. Here, the receiver and manager is not selling the land as chargee but as chargor. Therefore he need not sell according to the provisions of the Sabah Land Ordinance. The chargor, as registered proprietor is entitled to sell in such manner as the owner thinks fit and since the receiver and manager is here acting as the agent of the chargor he may sell by private treaty, subject of course to the rights and consent of the encumbrancer ie, the 2nd defendant.

**[36]** Accordingly, this second declaration sought by the plaintiffs must also be refused.